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Torts--Nuisance--Liability for Double-Parking (Harnik v. Levine, 106 N.Y.S.2d 460 (N.Y. Munic. Ct. 1951))

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in assumpsit is to circumvent the intended purpose of the Negotiable Instruments Law, and extend the common law fiction of pleading in trover to an extent that even the pleaders during the time of Bracton dared not indulge. . . ." Likewise, the growth of the rule has been attributed to a failure on the part of the courts to give due consideration to the effect of abolishing the theory of the assignment of the account by the drawer upon the issuance of the check.[22]

In the new Uniform Commercial Code, it is specifically provided that payment on a forged instrument is a conversion.[23] The Code, in amending and combining Sections 127 and 189 of the Negotiable Instruments Law,[24] also attempts to remove some of the existing doubts as to potential tort liability arising outside the instrument.[25]

TORTS—NUISANCE—LIABILITY FOR DOUBLE-PARKING.—Plaintiff lawfully parked his car on a public street. When he returned forty minutes later, he was unable to leave because defendant had double-parked alongside his car. Plaintiff claimed that as a result of such discomfort and inconvenience he suffered damages in the amount of twenty-five dollars. Defendant moved for judgment on the pleadings. *Held,* motion denied. The complaint states a cause of action. An obstruction in the public highway is a nuisance. *Harnik v. Levine,* 106 N. Y. S. 2d 460 (N. Y. Munic. Ct. 1951).

The steadily increasing volume of traffic in the City of New York has produced a situation in which the lot of the average motorist is far from a happy one. Among the more frustrating concomitants of such a situation is the virtual imprisonment of one lawfully parked by a double-parker. Practical experience clearly demonstrates that the annoyance and inconvenience caused thereby is not a fictitious element. Few such victims, however, have attempted to litigate their rights.

Concededly, double-parking is a violation of the Traffic Regulations of the City of New York which provide: "No person shall park a vehicle: . . . (o) on the roadway side of any vehicle stopped or parked at the edge or curb of a street. (Double-parking.)" [1]

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[22] Miller v. Northern Bank, 239 Wis. 12, 300 N. W. 758, 760 (1941).

[23] UNIFORM COMMERCIAL CODE § 3-419 (Spring 1951).

[24] UNIFORM COMMERCIAL CODE § 3-409 (Spring 1951). "(1) A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it." See note 6 *supra.*

[25] UNIFORM COMMERCIAL CODE § 3-409, Comment 3 (Spring 1950). "The language of the original section 189, that the drawee is not liable 'to the holder,' is changed as inaccurate and not intended. The drawee is not liable on the instrument until he accepts; but he remains subject to any other liability to the holder."

[1] TRAFFIC REGULATIONS OF THE CITY OF NEW YORK Art. 2, § 10(o).

Thus viewed, it is an unlawful act. But is double-parking a nuisance? And if so, is it such a nuisance as will give rise to a cause of action in favor of one who is inconvenienced thereby?

Although a nuisance is, in the most basic, elementary terms, "anything which worketh hurt, inconvenience, or damage," [2] courts further classify nuisances as public and private.

A public nuisance is one which affects an indefinite number of persons, or all the residents of a particular locality, or all the persons coming within the range of its operation in their exercise of a public right, although the extent of the annoyance inflicted upon individuals may be different.[3]

Historically, a private nuisance has meant any injury to, or interference with, land or an interest therein,[4] but it may also denote an act which unlawfully hinders an individual in the enjoyment of a common or public right.[5] It is clear, therefore, that the same thing, condition, or act may be a public nuisance and, at the same time, a private nuisance.[6]

One of the many conditions which have been classified as public nuisances is an obstruction of a street or highway,[7] the reason being that the primary purpose of a highway is to permit the unimpeded passing and repassing of the public.[8]

However, a private individual is not vested with a right of action by the mere existence of a public nuisance.[9] Such a right vests only where there is a special or peculiar injury as distinguished from that suffered by the public in general.[10] Some courts have defined the term "special or peculiar injury" as an injury different not only in degree but also in kind from that suffered commonly by the public.[11] But this definition has not been universally accepted. Other courts

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[2] 3 BL. COMM. *216.

[3] Dean v. State, 151 Ga. 371, 106 S. E. 792 (1921); *see* Lansing v. Smith, 4 Wend. 9, 29-33 (N. Y. 1829); People v. Transit Development Co., 131 App. Div. 174, 178-179, 115 N. Y. Supp. 297, 301 (2d Dep't 1909); Finklestein v. City of Sapulpa, 106 Okla. 297, 234 Pac. 187 (1925).

[4] 3 BL. COMM. *216.

[5] Ackerman v. True, 175 N. Y. 353, 67 N. E. 629 (1907); *see* Kavanagh v. Barber, 131 N. Y. 211, 214, 30 N. E. 235 (1892).

[6] *See* Kelly v. Mayor of New York, 6 Misc. 516, 519, 27 N. Y. Supp. 164, 166-167 (Sup. Ct. 1894).

[7] Murphy v. Legget, 164 N. Y. 121, 58 N. E. 42 (1900); Callahan v. Gilman, 107 N. Y. 360, 14 N. E. 264 (1887); Ely v. Campbell, 59 How. Pr. 333 (N. Y. 1879).

[8] Cohen v. Mayor of New York, 113 N. Y. 532, 21 N. E. 700 (1889).

[9] Manhattan Bridge Three-Cent Line v. Third Ave. Ry., 154 App. Div. 704, 139 N. Y. Supp. 434 (2d Dep't 1913); Close v. Whitbeck, 126 App. Div. 544, 110 N. Y. Supp. 717 (3d Dep't 1908).

[10] Buchholz v. N. Y., Lake Erie & W. R. R., 148 N. Y. 640, 43 N. E. 76 (1895); *cf.* Manhattan Bridge Three-Cent Line v. Third Ave. Ry., 154 App. Div. 704, 139 N. Y. Supp. 434 (2d Dep't 1913).

[11] *See* Dangelo v. McLean Fire Brick Co., 287 Fed. 14, 16 (6th Cir. 1923); Hampton v. N. C. Pulp Co., 49 F. Supp. 625, 630 (E. D. N. C. 1943); McGovern Trucking Co. v. Moses, 92 N. Y. S. 2d 550, 552 (Sup. Ct. 1949).

have adopted the position that where there is a special injury to the complainant, whether it be different in kind or merely greater in degree from that commonly suffered, relief should be granted.[12] The right of action does not exist where plaintiff has suffered merely nominal or theoretical damages,[13] although if actual damages are suffered, the triviality thereof is immaterial.[14]

In the principal case, the common injury resultant from defendant's act was the momentary hampering of all motorists using the street. Plaintiff, however, was specially injured in that he could not move at all; he was totally obstructed. The resultant discomfort and inconvenience suffered by plaintiff were proper elements of his actual damages [15] despite the fact that they might be difficult of exact mathematical ascertainment.[16]

The determination by the court, that one who double-parks renders himself civilly liable for damages at the suit of one obstructed thereby, is undoubtedly a novel application of the nuisance theory. The conclusion as to such liability, though not based on precedent in point, was however based on litigated situations which are clearly analogous.[17]

Whether this decision will be successful in curbing the undesirable situations condemned by it, remains to be seen. In any event it represents the establishment of a precedent whose legal and juridical consequences may well spread to areas of the law heretofore bare of litigation.

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[12] Carver v. San Pedro, L. A. & S. L. R. R., 151 Fed. 334 (C. C. S. D. Cal. 1906); Piscataqua Nav. Co. v. New York, N. H. & H. R. R., 89 Fed. 362 (D. C. Mass. 1898); Gulf States Steel Co. v. Beveridge, 209 Ala. 473, 96 So. 587 (1923).

[13] McDonald v. English, 85 Ill. 232 (1877); Gordon v. Baxter, 74 N. C. 470 (1876); Hazen v. Perkins, 92 Vt. 414, 105 Atl. 249 (1918).

[14] Flynn v. Taylor, 127 N. Y. 596, 28 N. E. 418 (1891); Pierce v. Dart, 7 Cow. 609 (N. Y. 1887) (Plaintiff was obliged, on four occasions, to stop and pull down a fence across a highway. His action against the defendant was allowed, although the loss to plaintiff did not exceed twenty-five cents for all four times.); Crooke v. Anderson, 23 Hun 266 (N. Y. 1880).

[15] Randolf v. Town of Bloomfield, 77 Iowa 50, 41 N. W. 562 (1889); Oklahoma City v. Eylar, 177 Okla. 616, 61 P. 2d 649 (1936).

[16] Johnston v. City of Galva, 316 Ill. 598, 147 N. E. 453 (1925); Bates v. Holbrook, 89 App. Div. 548, 85 N. Y. Supp. 673 (1st Dep't 1904).

[17] The standing of stagecoaches for an unreasonable length of time in a highway so as to ". . . obstruct the transit of his Majesty's subjects who wished to pass through it . . ." is a nuisance for which the defendant is criminally liable. Rex v. Cross, 3 Camp. 224, 225, 170 Eng. Rep. 1362, 1363 (N. P. 1812). *Cf.* McLaurine v. City of Birmingham, 247 Ala. 414, 24 So. 2d 755 (1946); Hughes v. City of Phoenix, 64 Ariz. 331, 170 P. 2d 297 (1946) (ordinances declaring illegally parked automobiles to be public nuisances, subject to being impounded by police, held valid and constitutional).